

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ZURICH AMERICAN INSURANCE  
COMPANY,

Plaintiff(s),

-against-

EMIRATES; EMIRATES SKY CARGO;  
EMIRATES AIRLINE; EMIRATES GROUP,  
INC.,

Defendant(s).

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Case No. 1:21-cv-8203-VSB

**DEFENDANTS' ANSWER AND  
AFFIRMATIVE DEFENSES**

Defendants Emirates (d/b/a Emirates Airline and Emirates SkyCargo; hereinafter “Emirates”), and Emirates Group (incorrectly sued herein as “Emirates Group, Inc.”), by and through its undersigned counsel, answer Plaintiff’s Complaint and assert affirmative defenses as follows:

**ANSWER**

Each paragraph of this Answer responds to the same numbered paragraph of the Complaint. Except as otherwise expressly alleged, Defendants deny each and every allegation in the Complaint.

1. The allegations in paragraph 1 of the Complaint are legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in paragraph 1 of the Complaint.

2. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations in paragraph 2 of the Complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations in paragraph 3 of the Complaint.

4. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations in paragraph 4 of the Complaint.

5. Deny the allegations in paragraph 5 of the Complaint except admit that Emirates is a foreign corporation organized and existing under the laws of the United Arab Emirates (“UAE”).

6. Deny the allegations in paragraph 6 of the Complaint except admit that Emirates is a foreign corporation organized and existing under the laws of the of the UAE.

7. Deny the allegations in paragraph 7 of the Complaint except admit that Emirates is a foreign corporation organized and existing under the laws of the UAE.

8. Deny the allegations in paragraph 8 of the Complaint except admit that Emirates Group is a foreign corporation organized and existing under the laws of the UAE.

9. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations in paragraph 9 of the Complaint.

10. The allegations in paragraph 10 of the Complaint are legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in paragraph 10 of the Complaint except admit that Emirates is a foreign air carrier duly certificated by the U.S. Department of Transportation engaged in the business of the international carriage by air of passengers, baggage and cargo.

**AS TO AS AND FOR A FIRST CAUSE OF ACTION**  
**BREACH OF CONTRACT**

11. Deny the allegations in paragraph 11 of the Complaint.

12. Deny the allegations in paragraph 12 of the Complaint.

13. Deny the allegations in paragraph 13 of the Complaint except admit that Emirates received cargo for carriage pursuant to Air Waybill No. 176-19050021 in apparent good order and

condition subject to the Emirates conditions of contact and undertook to perform carriage of the cargo by air pursuant to Air Waybill No. 176-19050021.

14. The allegations in paragraph 14 of the Complaint are legal conclusions to which no response is required. To the extent a response is required, denied.

15. Deny the allegations in paragraph 15 of the Complaint and leave all questions of law for the Court.

16. Deny the allegations in paragraph 16 of the Complaint and leave all questions of law for the Court.

**AS TO AS AND FOR A SECOND CAUSE OF ACTION**  
**NEGLIGENCE**

17. Answering paragraph 17 of the Complaint, Defendants repeat, reiterate and reallege each and every response in paragraphs of 1 through 16 of this Answer.

18. Deny the allegations in paragraph 18 of the Complaint and leave all questions of law for the Court.

19. Deny the allegations in paragraph 19 of the Complaint and leave all questions of law for the Court.

20. Deny the allegations in paragraph 20 of the Complaint and leave all questions of law for the Court.

**AS TO AS AND FOR A THIRD CAUSE OF ACTION**  
**BREACH OF BAILMENT**

21. Answering paragraph 21 of the Complaint, Defendants repeat, reiterate and reallege each and every response in paragraphs of 1 through 20 of this Answer.

22. Deny the allegations in paragraph 22 of the Complaint and leave all questions for law for the Court.

23. The allegations in paragraph 23 of the Complaint are legal conclusions to which no response is required. To the extent a response is required, denied.

24. Deny the allegations in paragraph 24 of the Complaint and leave all questions for law for the Court.

25. Deny the allegations in paragraph 25 of the Complaint and leave all questions for law for the Court.

### **AFFIRMATIVE DEFENSES**

#### **AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

26. The Complaint fails to state a claim upon which relief can be granted.

#### **AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

27. Defendants performed all the terms and conditions of the contract between the parties, if any, which were to be performed by Emirates, in accordance with such terms and conditions of contract.

#### **AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

28. Defendants each are a "foreign state" as that term is defined in 28 U.S.C. § 1603 and, therefore, is entitled to all the rights, privileges, protections and defenses afforded by the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. 94-853, 90 Stat. 2891 codified at 28 U.S.C. §§ 1330, 1332, 1391 (f), 1441 (d) and 1602-1611 and the federal statutes enacted pursuant to the FSIA.

**AS AND FOR A FOURTH  
AFFIRMATIVE DEFENSE**

29. The transportation out of which the subject matter of this action arose during the course of "international carriage" within the meaning of a treaty of the United States known as the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force November 4, 2003), reprinted in S. Treaty Doc. 106-45, 1999 WL 33292734 (hereinafter "Montreal Convention"), and the rights of the parties are governed exclusively by the provisions of the Montreal Convention.

**AS AND FOR A FIFTH  
AFFIRMATIVE DEFENSE**

30. To the extent the Complaint can be read to assert state law claims against Defendants, they are completely preempted by the Montreal Convention and/or federal law, including the Federal Aviation Act of 1958 as amended (P.L. 5-726, 72 Stat. 731, formerly codified as 49 U.S.C. § 1301 *et seq.* now recodified and incorporated into 49 U.S.C. § 40101 *et seq.*) and 49 U.S.C. § 41713.

**AS AND FOR A SIXTH  
AFFIRMATIVE DEFENSE**

31. Pursuant to the Montreal Convention, the applicable tariffs and conditions of carriage as set forth in the relevant contract of carriage, and/or other applicable law, Defendants are not liable to Plaintiff for the loss or damage alleged in the Complaint.

**AS AND FOR A SEVENTH  
AFFIRMATIVE DEFENSE**

32. The liability of Defendants, if any, is limited or excluded in accordance with the provisions of the Montreal Convention including, but not limited to:

- a. Article 18.1 of the Montreal Convention, in that Plaintiff's alleged loss or damage did not occur during carriage by air;

- b. Article 18.2 of the Montreal Convention, in that Plaintiff's alleged loss or damage was caused or contributed to by an inherent defect, quality or vice of the cargo or by defective packing of the cargo performed by a person other than Emirates or its servants or agents;
- c. Article 20 of the Montreal Convention, in that Plaintiff's alleged damages were caused or contributed to by the negligence or other wrongful act or omission of Plaintiff or Plaintiff's insured;
- d. Article 22 of the Montreal Convention in that Emirates' liability, if any, is limited to 22 SDRs per kilogram of cargo shipped.

**AS AND FOR AN EIGHTH  
AFFIRMATIVE DEFENSE**

33. Pursuant to Article 33 of the Montreal Convention, this Court lacks treaty jurisdiction and therefore lacks subject matter jurisdiction over the claims asserted by Plaintiff in this action.

**AS AND FOR A NINTH  
AFFIRMATIVE DEFENSE**

34. The Complaint must be dismissed because Plaintiff lacks standing to assert a claim against Defendants to recover for the damage alleged in the Complaint.

**AS AND FOR A TENTH  
AFFIRMATIVE DEFENSE**

35. The alleged loss or damage was caused and brought about by an intervening and superseding cause and was not caused by Defendants or by a person for whom Defendants are responsible.

**AS AND FOR AN ELEVENTH  
AFFIRMATIVE DEFENSE**

36. Plaintiff or Plaintiff's insured failed to mitigate damage, if any, and therefore Plaintiff is barred from recovering any such damages from Defendants.

**AS AND FOR A TWELFTH  
AFFIRMATIVE DEFENSE**

37. The alleged damages complained of were not proximately caused by any culpable conduct on the part of Defendants.

**AS AND FOR A THIRTEENTH  
AFFIRMATIVE DEFENSE**

38. The damages allegedly sustained by Plaintiff were caused or contributed to by Plaintiffs/Plaintiff's insured's own negligence or culpable conduct and, therefore Defendants are not liable for any damages allegedly sustained by Plaintiff or, alternatively, its liability to Plaintiff is partial only and should be reduced in accordance with applicable law.

**AS AND FOR A FOURTEENTH  
AFFIRMATIVE DEFENSE**

39. The alleged damages complained of were caused or contributed to by the negligence or culpable conduct of parties other than Defendants and Defendants are, therefore, not liable to Plaintiff or, alternatively, the amount of damages recoverable by Plaintiff must be diminished in the proportion to which the negligence or culpable conduct attributable to parties other than Defendants bears to the negligence or culpable conduct which caused the damage.

**AS AND FOR A FIFTEENTH  
AFFIRMATIVE DEFENSE**

40. Defendants assert that if they are liable to Plaintiff, which liability Defendants expressly denies, then Defendants are entitled to a set-off for all settlements/benefits received by Plaintiff, including all amounts received from any collateral source.

**AS AND FOR A SIXTEENTH  
AFFIRMATIVE DEFENSE**

41. The Complaint should be dismissed on *forum non conveniens* grounds.

**AS AND FOR A SEVENTEENTH  
AFFIRMATIVE DEFENSE**

42. The Complaint should be dismissed because the Court lacks personal jurisdiction over the Defendants.

**AS AND FOR AN EIGHTEENTH  
AFFIRMATIVE DEFENSE**

43. Plaintiff's claims against Emirates Group should be dismissed for lack of subject matter jurisdiction because Emirates Group is immune from suit pursuant to the FSIA.

**AS AND FOR A NINETEENTH  
AFFIRMATIVE DEFENSE**

44. Defendants expressly preserve and do not knowingly or intentionally waive any of the affirmative defenses set forth in Fed. R. Civ. P. 8(c), which discovery may reveal to be applicable, or any other matter constituting an avoidance or affirmative defense. Defendants reserve their right to amend its Answer and Affirmative Defenses, as appropriate based on additional investigation.

**NOTICE OF APPLICABILITY OF FOREIGN LAW**

45. Pursuant to Fed. R. Civ. P. 44.1, Defendants hereby give notice that they may raise issues concerning the law of a foreign country in this matter.

WHEREFORE, Defendants demand judgment dismissing the Complaint in its entirety, together with attorneys' fees, costs, disbursements and such other and further relief as this Court deems just and proper.



Dated: November 30, 2021

**CLYDE & CO US LLP**

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